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相互协商程序问题研究

Research on Issues of Mutual Agreement Procedure

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## 内容摘要

近年来，随着经济全球化的迅猛发展和国际税收争议的持续增长，作为传统且最为重要的国际税务争议解决方式——相互协商程序（Mutual Agreement Procedure，以下简称“MAP”）长期存在的各种缺陷正愈发凸显，并日益成为严重阻碍 MAP 机制有效运行的不利因素。本文旨在以当前 MAP 机制持续有效运行所亟需关注的若干重要问题为主要研究对象，涵盖 MAP 机制启动、协商以及终结与执行等各阶段问题的研究，并试图为问题的解决及 MAP 机制整体有效性的提高寻得一条合理的路径。除了绪论和结论外，本文主要包括以下五章的内容：

第一章，国际法基础理论发展视野下的 MAP 问题研究。本章将 MAP 问题研究置于国际法基础理论发展的视野之下，并意以相关国际法基础理论的发展作为本文 MAP 研究的“问题发现与选择”的理论依据以及“问题分析与解决”的理论指导。首先，以“国际法主体理论”的发展为指导，MAP 问题研究亟需紧密联系“个人在国际法上地位正日益提升”以及个人与国家具有“利益的契合点”这一理论发展的重要特征。研究应重点关注纳税人权益保护的提高，并以此为“主线”，重点研究 MAP 机制启动、协商以及终结与执行等各阶段关涉纳税人切身利益的重要问题。这些问题，亦是提高 MAP 机制整体有效性所亟需解决的关键问题。其次，以“国家主权理论”的发展为指导，MAP 问题研究需要关注国家主权是“绝对性”与“相对性”的矛盾统一。以此为基础，需重点关注当前 MAP 机制发展所出现的挑战国家税收主权的现象——国际税收仲裁机制的缘起与发展，并对其在税收协定中的引进作出审慎斟酌。

第二章，MAP 概念与功能的基本界定。本章旨在为本文问题研究的最关键术语——MAP 的概念与功能作基本的界定，并为本文研究提供“概念基础”。本章指出，MAP 可区分为个别性 MAP 与普遍性 MAP 两种最基本的类型，并指出本文 MAP 问题研究主要集中于个别性 MAP 的问题研究。同时，本章就个别性 MAP 是否仅适用于双重征税，是否适用于双重不征税、是否仅适用于法律性双重征税以及协商性 MAP 是否适用等若干重要问题作了基

本澄清。

第三章，MAP 启动阶段问题研究。本章重点研究在 MAP 启动阶段关涉纳税人切身利益的，以及提高 MAP 启动机制有效性所亟需关注的若干重要问题。研究涵盖 MAP 启动阶段的“申请时限”、“可能性判断”、“MAP 与国内救济启动的关系”、“申请者与接受者的确定”以及“申请的拒绝与救济”等问题。本章指出，提高 MAP 启动机制的有效性应主要致力于三个方面的改进，一是逐步优化纳税人申请启动 MAP 的路径；二是尽可能减少拒绝 MAP 申请启动的理由；三是推动实现缔约国主管机关与纳税人在 MAP 申请启动过程中的积极互动。本章最后结合我国相关国内立法与税收协定实践，研究分析当前我国 MAP 启动机制的发展现状与发展趋势，指出应进一步推动我国 MAP 启动机制朝着“透明化、高效化”方向发展，并应积极借鉴国外有益机制的构建。

第四章，MAP 协商阶段问题研究。本章重点研究在 MAP 协商阶段关涉纳税人切身利益的，以及提高 MAP 协商机制有效性所亟需关注的若干重要问题。研究涵盖 MAP 协商阶段的“纳税人的法律地位”、“MAP 与国内救济的协调运作”以及“征税的暂停”等问题。本章指出，提高 MAP 协商机制的有效性应主要从以下三方面着手：一是增加对 MAP 协商期间纳税人应有的法律地位与应发挥的积极作用的“关注”；二是增加对 MAP 协商与国内救济协调关系的“关注”；三是增加对 MAP 协商期间相关征税措施暂停的“关注”。本章最后结合我国相关国内立法与税收协定实践，研究分析当前我国 MAP 协商机制的发展现状、发展特点及其所存在的问题，并指出我国 MAP 协商机制的改进与发展应重点关注 MAP 协商期间纳税人的法律地位，MAP 协商与国内救济机制的协调，以及 MAP 协商期间是否暂停征税等问题。

第五章，MAP 终结与执行阶段问题研究。本章重点研究在 MAP 终结与执行阶段关涉纳税人切身利益的，以及提高 MAP 执行机制有效性所亟需关注的若干重要问题。研究涵盖 MAP 终结与执行阶段的 MAP 协议的效力、MAP 协议的执行以及仲裁机制的引进等问题。本章指出，提高 MAP 结果的有效性应重点关注结果的“确定性”与“效率性”，包括厘清 MAP 协议的约束力，确保 MAP 协议的有效执行，但对于仲裁机制的引进及其效用，仍应作审慎斟酌。本章最后结合我国相关国内立法与税收协定实践，研究分析当

前我国 MAP 终结与执行机制所亟需关注的三个重要问题：我国 MAP 协议的约束力问题，我国 MAP 协议的执行问题以及我国税收协定仲裁机制的引进问题。本章指出，当前对于我国是否引进国际税收仲裁机制问题的解决，不应仅停留在其是否将对我国税收主权造成严重损害的理论判断上，而应建立在对我国税收协定争议解决实践中“多方面”错综复杂因素综合考量的基础上，作出合理的选择。

**关键词：**相互协商程序 启动 协商 终结 执行

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## ABSTRACT

In recent years, with the rapid development of economic globalization and sustained growth of international tax disputes, as a traditional and the most important resolution of international tax disputes, the long-existed of various defects of mutual agreement procedure (MAP) are conspicuous, as well as are becoming increasingly an unfavorable factor to the effective operation of MAP mechanism. This paper is intended to focus on several important issues that need to pay close attention to, including research on issues concerning initiation, negotiation, conclusion and implementation which constitute stages of a MAP operation, in order to make the current MAP mechanism continue to run effectively, and try to find a reasonable way for resolving the problems, as well as improving overall effectiveness of the MAP mechanism. In addition to the introduction and conclusion, this paper mainly includes the following five chapters:

Chapter I researches on MAP from the perspective of development of basic theories of international law. In this part, the relevant basic theories of international law are going to serve as theoretical basis of “issues discovery and selection”, as well as theoretical guidance of “issues analysis and solution” when researches on issues of MAP. Firstly, guided by the development of “theory of subject of international law”, the issues of MAP needs to be closely related to the important characteristics of the development of theory, which are the individual status in international law is heading toward expansion, and individual and state has mutual profit. Research should focus on the improvement of the protection of the taxpayer’s rights and interests, and take this as the “main line”, focus on critical issues relating to the vital interests of the taxpayer at each stage of a MAP operation, including initiation, negotiation, conclusion and implementation of MAP. Secondly, guided by the development of “theory of state sovereignty”, researching on issues of MAP needs to closely focus on absoluteness and relativity of state sovereignty which is contradictory but also unified. On this basis, mainly focus on the phenomenon that the development of MAP has challenge to national tax sovereignty. The phenomenon is originated from the development of international tax arbitration which should be introduced in



international tax treaties cautiously.

Chapter II makes basic definitions on concept and function of MAP. This part is going to make basic definitions on concept and function of MAP which are the most key terms, and to provide a “conceptual basis” for this paper. This part points out that MAP can be divided into two basic types, individual MAP and general MAP, and the former one is the core content of this paper. Meanwhile, some important issues are clarified in this part, such as whether individual MAP only applies to double taxation, whether individual MAP applies to double non taxation, whether individual MAP only applies to legal double taxation and whether consultative MAP applies and so on.

Chapter III researches issues relating to initiation of MAP. This part mainly studies several important issues arising from the stage of initiation of MAP, which are related to the vital interests of the taxpayer and are needed to be pay close attention to, so that could improve the effectiveness of MAP startup mechanism. The research covers the problems such as “time limits for MAP request”, “judgment of probability when request for MAP”, “relationship between MAP request and domestic remedies start”, “confirmation of MAP applicants and recipients”, “rejection and remedies of the application to MAP” etc. This part points out that improving the effectiveness of the MAP startup mechanism should mainly focus on the following three aspects: firstly, optimizing the accessing to MAP for the taxpayer; secondly, reducing reasons for denial of access to MAP; thirdly, cultivating active interaction between the competent authority and the taxpayer. Finally, combining Chinese relevant domestic legislation and tax treaties, studies the current situation and the basic trend of the development of MAP startup mechanism in China, as well as its optimization. According to the viewpoint of this paper, we should further promote the development of MAP starting mechanism in China in the direction of “transparent, efficient”, and should actively learn from mechanism construction in other countries.

Chapter IV researches issues relating to MAP negotiation. This part mainly studies several important issues arising from the stage of MAP negotiation, which are related to the vital interests of the taxpayer and are needed to be pay close attention to, for improving the effectiveness of mechanism of MAP negotiation. The research covers the problems such as “MAP negotiation and role of the

taxpayer”, “suspension of collection of taxation in MAP negotiation” and “coordination of MAP and domestic remedies” etc. This part points out that improving the effectiveness of the mechanism of MAP negotiation should mainly focus on the following three aspects: firstly, increasing focus on legal status and active role of the taxpayer in MAP negotiation; secondly, increasing focus on coordination of MAP and domestic remedies; thirdly, increasing focus on suspension of collection of taxation in MAP negotiation. Finally, combining Chinese relevant domestic legislation and tax treaties, this part studies the development of mechanism of MAP negotiation in China, including its characteristics, problems and current situation. According to the viewpoint of this paper, the improvement and development of the MAP negotiation mechanism should also first focus on the issues of “MAP negotiation and role of the taxpayer”, “suspension of collection of taxation in MAP negotiation” and “coordination of MAP and domestic remedies” etc.

Chapter V researches issues relating to conclusion and implementation of MAP. This part mainly studies several important issues arising from the stage of conclusion and implementation of MAP, which are related to the vital interests of the taxpayer and are needed to be pay close attention to, so as to improve the effectiveness of mechanism of conclusion and implementation of MAP. The research covers the problems such as “effect of mutual agreements”, “implementation of mutual agreements”, and “introduction of arbitration” etc. This part points out that improving the effectiveness of the mechanism of conclusion and implementation of MAP should mainly focus on the “certainty” and “efficiency” of the result of MAP, including clarifying the effect of mutual agreements and insuring its effective implementation. However, with respect to the introduction of arbitration mechanism and its utility, we should judge cautiously. Finally, combining Chinese relevant domestic legislation and tax treaties, this part studies the following three problems relating to the mechanism of conclusion and implementation of MAP in China, which are needed to be pay close attention to: binding effect of mutual agreements in China, implementation of mutual Agreements in China, and introduction of arbitration in Chinese Tax Treaty etc. For resolving the problem of whether to introduce international tax arbitration mechanism in Chinese tax treaty at present, we should not only judging from the theoretical perspective, whether it will cause

serious damage to our national tax sovereignty, but should making comprehensive research on the complex factors in our country's tax treaty disputes, so that could make a reasonable choice.

**Key words:** Mutual Agreement Procedure, Initiation, Negotiation, Conclusion, Implementation

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